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No. (1) 08-421

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In The Supreme Court of the United States

JOHNNY RAY PHILLIPS,

Petitioner,

v.

GASTON COUNTY; JAN WINTERS, in his Official Capacity as County Manager for Gaston County; GASTON COUNTY POLICE DEPARTMENT; and WILLIAM J. FARLEY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether the Fourth Circuit used the incorrect standard in conflict with this Court's opinions and that of other Courts of Appeal when it held that Phillips had no property interest in continued employment arising from the state statute and from the implied agreement.

LIST OF PARTIES

The parties below are listed in the caption.

CORPORATE DISCLOSURE STATEMENT

Petitioner states that he is an individual and that there are no parents or subsidiaries whose disclosure is required under Rule 29.6.

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PETITION FOR WRIT OF CERTIORARI

Johnny R. Phillips respectfully petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit in this action.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unofficially reported at 278 Fed. Appx. 276 (4th Cir. May 22, 2008) and is reproduced at App. 1a-3a. The order of the Fourth Circuit denying Mr. Phillips' petition for rehearing and for rehearing *en banc* is not reported, but is reproduced at App. 35a-36a. The memorandum and order of the United States Magistrate Judge for the United States District Court for the Western District of North Carolina is unofficially reported at 2007 WL 922921 (W.D.N.C. March 26, 2007) and is reproduced at App. 4a-32a.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit, affirming the magistrate judge's order, was entered on May 22, 2008. A timely petition for rehearing was denied on June 30, 2008. This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the order denying the petition for rehearing. This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Fourth Circuit, pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The relevant North Carolina statutory provision is *An Act Relating to the Gaston County Police Department*, Pub. L. No. 1983-904, H626. § 3 (1983), which is reproduced at App. 37a-47a.

STATEMENT OF THE CASE

Facts Relevant to Petition

During his tenure of twenty-three years, Johnny R. Phillips advanced to the rank of "major" with the Gaston County Police Department ("GCPD") while gaining a reputation for being "highly respected" and a "dedicated-worker" that is "fully committed to his job." William Farley, who was named "major" around the same time as

Phillips, was named "interim chief" upon the retirement of the predecessor chief. Both Farley and Phillips applied for the vacant "chief" position. During the interview process for the chief position, Phillips provided his candid appraisal of the leadership at GCPD, which presented Farley in an unflattering light. Farley was eventually named chief of the GCPD.

Within a couple weeks of being named chief, Farley placed Phillips on "administrative leave" to investigate "concerns" about whether Phillips made undisclosed "threatening" comments about Farley. At no time did Farley ever disclose the alleged "threatening" comments to Phillips or otherwise inquire with Phillips as to whether any of the allegations were true. Phillips denied that he ever made any threatening comments to or about Farley at any time.

Farley placed Phillips on "administrative leave" and asserted that the length of the leave would be dependent upon the following circumstances: 1) that an "investigation and findings" would be completed regarding Phillips' alleged behavior; 2) that Phillips would schedule an initial consultation with Law Enforcement Services, Inc. ("LESI"), a police psychologist; and 3) that Phillips successfully complete a "fit for duty" evaluation from LESI and that a "satisfactory report and recommendation" be received.

Phillips scheduled an appointment with LESI and completed a "fit for duty" evaluation with Dr. Marshall. A genuine issue of material fact exists in

this case as to whether Farley received a "satisfactory report and recommendation" from LESI.[1] GCPD policy requires that Farley conduct an investigation concerning the allegations about Phillips and to make a finding and conclusion "within a reasonable time" or return Phillips to work. However, even after a period of two years, Farley failed to take any steps to "investigate" or otherwise attempt to substantiate the alleged "threats" attributed to Phillips or even inquire with Phillips as to whether any threats were made.

About three weeks after he was placed on "administrative leave," Phillips received a call from the assistant county manager, Rob Beasley. At Beasley's request, Phillips agreed to meet with him at a local restaurant for lunch. Beasley admitted to Phillips that he did not see any ground for disciplinary action against him. Beasley informed Phillips of two options for returning to duty: 1) Phillips could return to work by accepting a "voluntary demotion" to the rank of captain, lose $1,900.00 in salary, and all of "this medical stuff" would "disappear" from his personnel file; or 2) GCPD would issue Phillips an "involuntary demotion" to the rank of captain, Phillips would lose $20,000.00 in yearly salary, and the "medical stuff" would remain in Phillips' personnel file.

Phillips, who was never informed of any specificity as to what the alleged threats were, now began to understand what the "administrative leave"

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[1]A detailed factual statement concerning the genuine issue of material fact is not necessary due to the issue in this petition being limited to the "due process" claim.

situation was all about. Based on Beasley serving as a negotiation proxy for Farley with the apparent ability to return to Phillips to work at any time, Phillips became aware that Farley was setting him up to force a demotion or termination onto Phillips. Phillips became anguished after learning about the scheme to circumvent the "for cause" protections that GCPD employees had from demotions or terminations, under explicit GCPD policy and by North Carolina statute. App. 37a-47a. Following his meeting with Beasley, Phillips was in need of therapy due to the inherent stress of being "set up" for a demotion or termination. At this point, Phillips was not able to return to work so long as Farley were to continue to circumvent the "for cause" protections by forcing a demotion or termination on Phillips.

After Phillips met with Beasley, Farley switched Phillips from being on paid "administrative leave" to being on unpaid "administrative leave" pursuant to GCPD policy (but allowed to use sick leave benefits for pay). Significantly, Farley placed no time limitation on when the unpaid "administrative leave" would expire. While on unpaid "administrative leave," Phillips made attempts to obtain the specific allegations as to what "threats" had been attributed to him, but to no avail. Farley would not release the alleged details to Phillips, nor would Farley complete or otherwise take any steps in completing the "investigation." At some point about twenty months after being transferred to unpaid administrative leave, Phillips' accrued time for sick leave became exhausted. Within a few days after the sick leave became exhausted, Gaston County's human resources

director sent Phillips a letter to inform him that he had been terminated because his "leave balance" had been exhausted.[2] The letter did not provide Phillips with any notice of any rights to appeal the decision to the Civil Service Commission, pursuant to the rights contained in the Act. Once any leave time was exhausted, then under GCPD's policy, Phillips should have remained on unpaid administrative leave until Farley completed the "investigation."

Even if Phillips were no longer on unpaid "administrative leave" (even though his accrued paid sick leave had expired) then under GCPD policy, Phillips was entitled to receive oral and written warnings before being terminated. GCPD policy explicitly classified the "absence without proper notification to the employer" as being a performance-related inadequacy that protected Phillips from termination until after he had received the required oral and/or written warnings. Shortly after the termination, Phillips' therapist had cleared him to return to work.

Phillips filed an internal grievance with the Gaston County Personnel Commission. At the hearing, the chairman preliminarily concluded that Phillips was cleared to return to work because the met the conditions that Farley had set. At the hearing and for the first time ever, Phillips received (under Gaston County's objection) a copy of the purported allegations that had been made about him. The hearing, however, was never completed

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[2]Note that the Act, however, places the exclusive authority to terminate employees on Farley, as chief of police.

(i.e. Phillips never had the opportunity to put on any evidence) because the chair continued the hearing indefinitely to have Beasley testify about the lunch meeting with Phillips were the voluntary/involuntary demotions option was discussed. Notably, at this hearing, the county attorney---who advocated at the hearing on behalf of the county---went in to executive session with the Commission at the same grievance hearing outside the presence of Phillips to confer about the hearing.

About one week after the partial grievance hearing, a Gaston County official contacted the chair *ex parte* and instructed him that the matter needed to be dismissed because Phillips had filed a (the present) civil action against Gaston County, et al. Even though there was no authority requiring that the grievance be dismissed, the Gaston County Personnel Commission dismissed Phillips' grievance, as instructed by a Gaston County official.

Proceedings Below

Phillips sued Gaston County and Farley asserting claims under § 1983 for due process and equal protection violations of the Fourteenth Amendment in addition to state constitutional claims and tort claims. The parties consented to the exercise of jurisdiction by the magistrate judge pursuant to 28 U.S.C. § 636(c). The magistrate judge granted defendants' motion for summary judgment on all counts. As to Phillips' claims for violations of due process, the magistrate judge found that the North Carolina General Assembly did not grant Phillips a property interest in his employment

when it enacted the *An Act Relating to the Gaston County Police Department,* Pub. L. No. 1983-904, H626. § 3, N.C. Sessions Laws of 1983. App. 37a-47a. Even though the Act mandates *inter alia* that the Civil Service Board adopt rules to "insure a meaningful due process hearing" (App. 44a) and limits the chief's discretion to terminate employees (App. 40a), the magistrate judge opined that Act does not abrogate North Carolina's common law adherence to being an "At will" employment state for GCPD employees. The Fourth Circuit panel affirmed *per curiam* the order for summary judgment by adopting the reasons stated by the magistrate judge. App. 1a-3a.

REASONS FOR ALLOWANCE OF THE WRIT

I. THE FOURTH CIRCUIT'S OPINION CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT AND THAT OF OTHER CIRCUITS FOR DETERMINING WHEN A "PROPERTY INTEREST" IS CREATED IN FOURTEENTH AMENDMENT "DUE PROCESS" JURISPRUDENCE.

Procedural due process ensures that a state will not deprive a person of life, liberty, or property unless fair procedures are used in making that decision. U.S. CONST. amend. XIV, § 1. A plaintiff's federal constitutional right of due process depends on plaintiff having had a property right in continued employment. *Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985). Property interests in employment are created by existing rules or understandings that stem from an independent

source, such as state law, rules or understandings that secure benefits and that support claims of entitlement to those benefits. *Bd. Of Regents v. Roth*, 408 U.S. 564, 577 (1972).

A. Review is Necessary to Resolve the Conflict between the Fourth Circuit's Standard for Determining the Creation of a "Property Interest" with the Standard that the Court and other Circuits have Held.

In *Town of Castle Rock*, this Court noted that "[o]ur cases recognize that a benefit is not a protected entitlement if government officials may grant or deny it in their discretion. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005). Other Circuits have similarly held that a law establishes a property interest in employment if it restricts the grounds on which an employee may be discharged. *See Asbill v. Housing Authority of Choctaw Nation*, 726 F.2d 1499, 1502 (10th Cir. 1984); *Suckle v. Madison General Hospital*, 499 F.2d 1364, 1366 (7th Cir. 1974); *Cofone v. Manson*, 594 F.2d 934, 938 (2d Cir. 1979); *Wells Fargo Armored Service v. Georgia Pub. Ser. Comm.*, 547 F.2d 938, 942 (5th Cir. 1977); *Lake Michigan Col. Fed. Of Teachers v. Lake Michigan Comm. Col.*, 518 F.2d 1091, 1095 (6th Cir. 1975); *Hayward v. Henderson*, 623 F.2d 596, 597 (9th Cir. 1980). As evident by the rulings of this Court and that of other circuits, the true standard for finding a property interest is finding "substantive restrictions" on the ability of an employer to terminate an employee.

In the case *sub judice*, Phillips asserts that the basis for his "property interest" in his employment with GCPD arises from the substantive rights contained in the Act. *See* App. 37a-47a. The Act establishes that members of the GCPD "shall be under the control and direction of and shall be responsible to the Chief of Police for the proper conduct of the various duties of the Department."[3] App. 40a. If the North Carolina General Assembly had intended for the members of the GCPD to be "at will" employees, the legislative body would have easily asserted that members of the GCPD work at the pleasure of the chief of police, or something to that effect. However, the Act contains no such language.

Instead, the Act states "[t]he Chief of Police may discipline, suspend or terminate any officer of the Department for any misconduct in office, or for any infraction of the rules, regulations or procedures established by the Chief of Police and approved by the Board of County Commissioners. *Id.* Clearly, the Act restricts the grounds for which Farley could terminate Phillips. Instead of the "at-will" standard where an employer can terminate an employee "for arbitrary, irrational, indifferent, or illogical reasons without any legal recourse, the Act limits Farley from having the unbridled discretion to terminate members of the GCPD. Under the language of the Act, Phillips did not "work at the pleasure" of Farley. Farley's discretion to terminate Phillips was limited to his establishing misconduct in office or an

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[3]Hence, only the Chief of Police has the authority to terminate members of the GCPD under the "cause" items provided therein.

infraction of the rules, regulations or procedures; hence, some kind of "cause."

The Fourth Circuit's standard departed from the standard set forth in this Court's decision in *Town of Castle Rock*. In departing from this Court's standard, the Fourth Circuit acknowledged that the substance contained in the Act is "capable of being interpreted" as one that "affords a property interest in employment." App. 28a-29a. But, the Fourth Circuit asserted that the content of the Act is likewise capable of being interpreted as "one which merely lists reasons for which Chief Farley could dismiss Plaintiff." *Id.* Note that when using the standard set forth in *Town of Castle Rock*, the second possible interpretation can still establish a "property interest" in one's employment. If the "listing of reasons" limited Farley's otherwise unlimited discretion to terminate employees for any reason, even no reason or an illogic reason, then a property interest is established under this Court's standard and that of other circuits. However, the Fourth Circuit, while acknowledging that a "property interest" could legitimately be interpreted from the Act, opted instead for the second interpretation under the false assumption that the second assumption automatically excludes the prospects of establishing a property interest. The Fourth Circuit asserts that North Carolina's "manifest commitment to the doctrine of employment at will" calls for it to find that the second interpretation excludes a property interest.

App. 28a. Of course, this assertion commits the logical fallacy known as *begging the question*.[4]

The Fourth Circuit's ruling in this case conflicts with the rulings from the Seventh Circuit, which has found property interest rights from statutory language substantially similar to that in the case at bar. In *Boehning*, the statute provided that "[a]ny employee *may* be dismissed, demoted, suspended or laid off for cause." *Indiana State Employees Association, Inc. v. Boehning*, 511 F.2d 834, 837-38 (7th Cir. 1975)(emphasis added). Unlike in the case at bar, this provision *Boehning* was not the exclusive substantive statute for termination. Nonetheless, the Seventh Circuit held that "[t]he specification of authority to discharge for two types of grounds . . . of the Act clearly implies exclusion of other grounds" and found that the plaintiff had a property interest in his employment. *Id*; *see also Suckle v. Madison General Hospital*, 499 F.2d 1364, 1366 (7th Cir. 1974)(a plaintiff must show a substantive restriction on the hospital's discretion, namely, that reappointment may be denied only for certain reasons under state law).

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[4]The Fourth Circuit's standard also conflicts with the well-established canons of statutory interpretation, such as the "plain meaning" doctrine and the maxim that "the expression of one thing implies the exclusion of another thing ("*expression unius est exclusion alterius*"). *See Burgess v. Your House of Raleigh*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990)("where the language of a statute is clear and unambiguous, we apply its plain meaning"); *Appeal of Blue Bird Taxi Co.*, 237 N.C. 373, 75 S.E.2d 156 (1953).

Moreover, the Fourth Circuit's opinion conflicted with this Court's long-standing ruling in *Reagan v. United States*, 182 U.S. 419, 424 (1901)(*cited in Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985)). In *Reagan*, this Court found that the commissioners had a property interest in their employment by the state act that read: "[p]rovided, [t]hat the present commissioners shall be included in that number and shall hold office under their existing appointments, subject to removal by the judge of the district where said commissioners reside, for causes prescribed by law." *Id.* at 538. The phrases "subject to removal" and "for causes prescribed by law" as used in this context is permissive in a manner substantially similar to the word "may," as used in the case at bar.

The Fourth Circuit stated that the provision "should" have been clear that the enumerated grounds for termination were "the only reasons for which an officer of the Department may be terminated." App. 30a. Aside from the fact that the Fourth Circuit specifically *acknowledged* that a reasonable interpretation could be made that the Act provided property rights in employment, the provisions in the Act, when considered with other tenants of North Carolina law undoubtedly establish that the listed grounds were the "only reasons" for which a member could be disciplined. This analysis begins with the fact that in North Carolina, counties have no power, except that which In North Carolina, counties exercise only such general supervision and control of county affairs as are prescribed by law. N.C. CONST. art. 7, § 2. Statutorily granted powers to counties are to be strictly construed. *Davidson*

County v. City of High Point, 321 N.C. 252, 362 S.E.2d 553 (1987). The county manager had no power to suspend or terminate Phillips since his appointment was provided for by the Act. N.C. GEN. STAT. § 153A-82(1). Accordingly, the only way that Phillips could have been terminated were for those reasons *expressly enumerated* in the Act. If the General Assembly had intended for the GCPD members to be "at will" employees, it would have made it clear in the Act. The Fourth Circuit's opinion conflicts with well-established law when it writes additional grounds for termination that are not contained in the statutory language, particularly when the statutory powers are to be strictly construed.

B. Review is Necessary to Resolve the Conflict Arising from the Fourth Circuit's Failure to Follow this Court's Ruling in *Perry v. Sindermann*.

This Court has recognized that a "person's interest in a benefit is a 'property' interest for due process purposes if there are . . . mutually explicit understandings that support his claim of entitlement to the benefit . . ." *Perry v. Sindermann*, 408 U.S. 593, 601 (1972). Providing proof of a "mutually explicit understanding" GCPD specifically acknowledges the "property interest" that its members have in their employment. Policy 26.1.3 of the GCPD policy manual explicitly provides that "[n]o permanent employee subject to this policy shall be discharged, suspended, or reduced in pay or position, except for *just cause*." App. 49a (emphasis added). This policy is explicitly signed by Chief

Farley.[5] App. 74a. Referencing the parlance of *Roth*, there is no "unilateral expectation" of a property interest—the property interest has been recognized by the GCPD. Indeed, the GCPD (and Farley himself) recognized the "just cause" rights that Phillips had in his employment in their own policy and procedures. As such, the Fourth Circuit ignored this Court's standard of looking at the "mutually explicit understandings" that support a claim for entitlement to the benefit, separate and apart from the statutory language.

C. Review is Necessary to Resolve the Conflict between The Fourth Circuit's Narrow Reading of What Creates a "Property Interest" with the More Expansive Interpretations by this Court and by Other Circuits.

This Court has held that the definitions for "liberty" or "property" should be generally construed with broad and expansive meanings. *Bd. Of Regents v. Roth*, 408 U.S. 564, 571-72, 576-78 (1972); *Accord Woods v. City of Wilmington*, 125 N.C. App. 226, 480 S.E.2d 429 (1997). In *Roth*, the Court observed that "[t]o have a property interest in a benefit, a person must have more than an abstract need or desire for

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[5]Due process property interest in public employment can be created by ordinance or *implied contract*. *Woods v. City of Wilmington*, 125 N.C. App. 226, 480 S.E.2d 429 (1997)(emphasis added); *see also Kingsford v. Salt Lake City School Dist.*, 247 F.3d 1123 (10th Cir. 2001)(presumption that employment without definite term of duration is at-will may be overcome by affirmative showing by employee that parties impliedly agreed to terminate relationship for cause alone).

it or a unilateral expectation of it, and he must have a *legitimate claim* of entitlement to it, it is a purpose of ancient institution of property to protect those claims upon which people *rely* in their daily lives . . ." *Roth*, 408 U.S. at 577 (emphasis added). This Court recognized that "property interests" may take many forms. *Id.* at 576. Indeed, this Court's holding in *Roth* recognized the principal that a "property interest" in public employment applied to a teacher who had been only recently hired without tenure or a formal contract, but who nonetheless had a "clearly implied promise of continued employment." *Id.* at 577 (quoting *Connell v. Higginbotham*, 403 U.S. 207, 208 (1971)).

Significantly, the Fourth Circuit acknowledged that the Act "on its face could have been read to provide a property interest in employment. App. 29a. However, the Fourth Circuit iterated that the provision of law is likewise capable of being interpreted as "one which merely lists reasons for which Chief Farley could dismiss the Plaintiff" *Id.* The Fourth Circuit concluded that since the Act capable of two interpretations and given that North Carolina is committed to the doctrine of employment at will, then the "provision must be read as to list reasons, among others, for which Chief Farley may dismiss and employee, not as one creating a property interest in employment." *Id.*

The Fourth Circuit failed to construe "property" using a broad and expansive meaning. Instead, the Fourth Circuit did the opposite: it narrowly construed "property" even though it

acknowledged that "on its face" the Act could have been read to provide a property interest in employment. The Act states precisely the opposite: the Act explicitly refers to the due process rights of the members when it states "[t]he Civil Service Board shall adopt procedural rules, subject to the approval of the Gaston County Board of Commissioners, which are sufficient to *insure a meaningful due process* hearing for any officer who requests a hearing prior to the enforcement of a disciplinary order." App. 44a (emphasis added). Not only was Phillips never provided with any *meaningful* due process hearing, but Phillips was never once even questioned about whether the allegations were true or false.

D. Review is Necessary to Resolve the Conflict Arising from the Fourth Circuit's Providing Undue Deference to State Law to Determine a Matter of Federal Constitutional Law Contrary to the Holding of this Court.

"Although the underlying substantive interest is created by 'an independent source such as state law,' *federal constitutional law* determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756-57 (2005)(emphasis in original); *see also Salve Regina College v. Russell*, 499 U.S. 225, 230-31 (1991). While the Fourth Circuit correctly found that North Carolina is an "employment at will" state, it incorrectly found that the North Carolina's "employment at will" doctrine essentially trumped a

statutory provision that limited the discretion of the chief to terminate the employment of members of the GCPD. The Fourth Circuit's ruling in the case at bar conflicts with this Court's ruling in *Town of Castle Rock* and that of other circuits by deferring a matter of federal constitutional law to the pre-existing "employment at will" state doctrine.

The Fourth Circuit reliance on this Court's holding in *Bishop v. Wood*, 426 U.S. 341 (1976) is specious. App. 26a. *Bishop* involved a city ordinance that provided, in relevant part, "[i]f a permanent employee fails to perform work up to the standard of the classification held, or continues to be negligent, inefficient, or unfit to perform his duties, he may be dismissed by the City Manager." *Id.* at 344 n. 5. Based on its understanding of state law, the district court had concluded that the employee had no protected property interest in the position. *Id.* at 345. The Supreme Court affirmed that determination, noting that although on its face the ordinance "may fairly be read as conferring" a guarantee of continued public employment . . . such a reading is not the only possible interpretation; the ordinance may also be construed as granting no right to continued employment but merely conditioning an employee's removal on compliance with certain specified procedures." *Id.*

The Fourth Circuit misapplies the holding in *Bishop* when it held that because the Court construed the *Bishop* ordinance as merely conditioning a right to removal on procedural compliance, the instant ordinance should likewise be interpreted. However, while paying homage to it,

the Fourth Circuit in its application overlooks that *Bishop* was based largely on the principle of deference to the district court's interpretation of state law—a principle that the Court has since abolished. *See Salve Regina College*, 499 U.S. at 230-31; *Town of Castle Rock*, 545 U.S. at 756-57. After noting, for example, that the district court's construction of the statute was upheld by the Fourth Circuit, "albeit by an equally divided court," the Court observed that it had in comparable circumstances "accepted the interpretation of state law in which the district court and the court of appeals had concurred even if an examination of the sate-law issue without such guidance might have justified a different conclusion." *Bishop*, 426 U.S. at 345-46 & n. 10. While this Court acceded to the district court's interpretation it did so with the explicit caveat, noted above, that the ordinance also could "fairly be read" as conferring a property right in continued employment.

The Fourth Circuit's deference in the case at bar to this Court's holding in *Bishop*, which has since been overruled on the basis of deferential standard conflicts substantially with this Courts holdings in *Town of Castle Rock* and *Salve Regina College*. Notably, the Fourth Circuit in the present case cited the *Still v. Lance* case to express the erroneous standard for a property interest: "The North Carolina Supreme Court has held that an enforceable expectation of continued public employment in that State can exist only if the employer, by statute or contract, has actually granted some form of guarantee . . ." (App. 25a). Note that this standard is not the correct standard

as set forth by this Court where the true standard for finding a property interest is finding "substantive restrictions" on an ability of an employer to terminate an employee. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756-57 (2005). As a result, this Court's review of the Fourth Circuit's decision in the case at bar is necessary to clarify the correct standard that all circuits and states should apply when evaluating whether a "property interest" in continued employment has been created by a state law, implied contract, or other valid source.

CONCLUSION

For all the foregoing reasons, petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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